

IN THE IOWA DISTRICT COURT FOR DELAWARE COUNTY

DEBORAH FERGUSON,  Plaintiff,  vs.  EXIDE TECHNOLOGIES, INC., FRED GILBERT, and BRENDA SAUNDERS,  Defendants.	Case No. LACV008271   <b>PLAINTIFF'S PROPOSED JURY INSTRUCTIONS AND VERDICT FORM</b>
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**COMES NOW** Plaintiff Deborah Ferguson, and requests that the jury be instructed as set forth in these proposed Instructions and Verdict Form.

/s/ Amy Beck  
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ATTORNEYS FOR PLAINTIFF

**PLAINTIFF'S PROPOSED PRELIMINARY INSTRUCTION NO. 1**

**Instruction Before Voir Dire**

Members of the Jury Panel, if you have a cell phone, PDA, Blackberry, smart phone, iPhone or any other wireless communication device with you, please take it out now and turn it off. Do not turn it to vibration or silent; power it down. During jury selection, you must leave it off. (Pause for thirty seconds to allow them to comply, then tell them the following:)

If you are selected as a juror, you will have to keep your cell phones off at all times when you are present in court. You may use your cell phones during breaks.

I understand you may want to tell your family, close friends, and other people about your participation in this trial so that you can explain when you are required to be in court, and you should warn them not to ask you about this case, tell you anything they know or think they know about it, or discuss this case in your presence. You must not post any information on a social network, or communicate with anyone, about the parties, witnesses, participants, claims, evidence, or anything else related to this case, or tell anyone anything about the jury's deliberations in this case until after I accept your verdict or until I give you specific permission to do so. If you discuss the case with someone other than the other jurors during deliberations, you may be influenced in your verdict by their opinions. That would not be fair to the parties and it would result in a verdict that is not based on the evidence and the law.

While you are in the courthouse and until you are discharged in this case, do not provide any information to anyone by any means about this case. Thus, for example, do not talk face-to-face or use any electronic device or media, such as the telephone, a cell or smart phone, camera, recording device, Blackberry, PDA, computer, the Internet, any Internet service, any text or instant messaging service, any Internet chat room, blog, or Website such as Facebook, MySpace, YouTube, or Twitter,

or in any other way communicate to anyone any information about this case until I accept your verdict or until you have been excused as a juror.

Do not do any research -- on the Internet, in libraries, in the newspapers, or in any other way -- or make any investigation about this case on your own. Do not visit or view any place discussed in this case and do not use Internet programs or other device to search for or to view any place discussed in the testimony. Also, do not research any information about this case, the law, or the people involved, including the parties, the witnesses, the lawyers, or the judge until you have been excused as jurors.

The parties have a right to have this case decided only on evidence they know about and that has been presented here in court. If you do some research or investigation or experiment that we don't know about, then your verdict may be influenced by inaccurate, incomplete or misleading information that has not been tested by the trial process, including the oath to tell the truth and by cross-examination. Each of the parties is entitled to a fair trial, rendered by an impartial jury, and you must conduct yourself so as to maintain the integrity of the trial process. If you decide a case based on information not presented in court, you will have denied the parties a fair trial in accordance with the rules of this country and you will have done an injustice. It is very important that you abide by these rules. Failure to follow these instructions could result in the case having to be retried.

**Authority**

8th Circuit Model Civil Jury Instruction 1.1

**PLAINTIFF'S PROPOSED PRELIMINARY INSTRUCTION NO. 2**

**Statement of the Case**

This is a civil case brought by Plaintiff Deborah Ferguson against Defendants Fred Gilbert and Exide Technologies, Inc. Ms. Ferguson was employed by Exide Technologies, Inc. from 2012 to 2016. On November 2, Defendants asked Ms. Ferguson to submit to drug and alcohol testing. Believing the tests violated the law, Ms. Ferguson refused to take the tests. Defendants fired her because of her refusal. Ms. Ferguson then brought this lawsuit, making two claims.

Ms. Ferguson's first claim is that Defendants violated Iowa law by demanding she submit to an illegal drug and alcohol test. Iowa Code section 730.5 sets forth requirements for workplace drug testing in the private sector. Section 730.5(8) provides strict guidelines employers must follow when selecting employees for drug or alcohol testing. If an employer fails to meet the requirements set forth in this section, it has violated Iowa's drug testing law and is subject to civil liability.

Ms. Ferguson's second claim is that Defendants' decision to fire her for refusing to take an illegal drug test also violated the public policy of the State of Iowa. An employer may not fire an employee for a reason that violates the public policy of our state. A public policy violation is present when an employer terminates an employee in retaliation for performing an important and socially desirable act, such exercising a statutory right or refusing to commit an unlawful act. Refusing to submit to an illegal drug test is the type of protected activity on which a public policy claim may be based.

The Court has already found as a matter of law that Defendants violated (1) Iowa Code section 730.5 and (2) the public policy of the State of Iowa when Defendants fired Ms. Ferguson for refusing to submit to an illegal drug test. Because of those findings by the Court, your only task is to decide the monetary value of Plaintiff's damages. Ms. Ferguson claims damages for lost wages and

benefits, as well as compensation for her emotional pain and loss of enjoyment of life. You may also decide if Defendants should be required to pay punitive damages.

Do not consider this summary as proof of any damages. Decide the damages from the evidence and apply the law which I will now give you.

**Authority**

Iowa Civil Jury Instruction 100.1

Iowa Code § 730.5

*Jasper v. H. Nizam, Inc.*, 764 N.W.2d 751, 761, 767 (Iowa 2009)

*Fitzgerald v. Salsbury Chem., Inc.*, 613 N.W.2d 275, 281 (Iowa 2000)

*Springer v. Weeks & Leo Co.*, 429 N.W.2d 558, 560 (Iowa 1988)

**PLAINTIFF'S PROPOSED PRELIMINARY INSTRUCTION NO. 3**

**Juror Questions**

You will be allowed to propose written questions to witnesses after the lawyers have completed their questioning of each witness. You may propose questions in order to clarify the testimony, but you are not to express any opinion about the testimony or argue with a witness. If you propose any questions, remember that your role is that of a neutral fact finder, not an advocate. Before I excuse each witness, I will offer you the opportunity to write out a question on your notepad. I will review the question with the attorneys to determine if it is legally proper.

There are some proposed questions that I will not permit, or will not ask in the wording submitted by the juror. This might happen either due to the rules of evidence or other legal reasons, or because the question is expected to be answered later in the case. If I do not ask a proposed question, or if I rephrase it, do not speculate as to the reasons. Do not give undue weight to questions you or other jurors propose. You should evaluate the answers to those questions in the same manner you evaluate all of the other evidence.

By giving you the opportunity to propose questions, I am not requesting or suggesting that you do so. It will often be the case that a lawyer has not asked a question because it is legally objectionable or because a later witness may be addressing that subject.

**Authority**

Ninth Circuit Manual of Model Civil Jury Instructions 1.15 (as modified).

**PLAINTIFF'S PROPOSED FINAL JURY INSTRUCTION NO. 1**

**Additional Instructions**

Members of the jury, the instructions I gave at the beginning of the trial and during the trial remain in effect. I now give you some additional instructions.

You must, of course, continue to follow the instructions I gave you earlier, as well as those I give you now. You must not single out some instructions and ignore others, because all are important. This is true even though some of those I gave you at the beginning of and during trial are not repeated here.

The instructions I am about to give you now, as well as the preliminary instructions given to you at the beginning of the trial, are in writing and will be available to you in the jury room.

In considering these instructions, the order in which they are given is not important.

**Authority**

8th Circuit Model Civil Jury Instruction 3.1

**PLAINTIFF'S PROPOSED FINAL JURY INSTRUCTION NO. 2**

**Judge's Opinion**

I have not intended to suggest what I think your verdict should be by any of my rulings or comments during the trial.

**Authority**

8th Circuit Model Civil Jury Instruction 3.2



**PLAINTIFF'S PROPOSED FINAL JURY INSTRUCTION NO. 3**

**Credibility of Witnesses**

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it, or none of it.

In deciding what testimony to believe, you may consider a witness' intelligence, the opportunity a witness had to see or hear the things testified about, a witness' memory, any motives a witness may have for testifying a certain way, the manner of a witness while testifying, whether a witness said something different at an earlier time, the general reasonableness of the testimony, and the extent to which the testimony is consistent with any evidence that you believe.

In deciding whether or not to believe a witness, keep in mind that people sometimes hear or see things differently and sometimes forget things. You need to consider therefore whether a contradiction is an innocent misrecollection or lapse of memory or an intentional falsehood, and that may depend on whether it has to do with an important fact or only a small detail.

**Authority**

8th Circuit Model Civil Jury Instruction 3.3

**PLAINTIFF'S PROPOSED FINAL JURY INSTRUCTION NO. 4**

**Burden of Proof, Preponderance of Evidence**

Whenever a party must prove something they must do so by the preponderance of the evidence.

Preponderance of the evidence is evidence that is more convincing than opposing evidence. Preponderance of the evidence does not depend upon the number of witnesses testifying on one side or the other.

**Authority**

100.3 Burden of Proof, Preponderance of Evidence

**PLAINTIFF'S PROPOSED FINAL JURY INSTRUCTION NO. 5**

**Statements by a Party Opponent**

You have heard evidence claiming Deborah Ferguson, Fred Gilbert, and other employees of Exide Technologies, Inc. made statements before this trial.

If you find such statements were made, you may regard the statements as evidence in this case the same as if the statements had been made under oath during the trial.

If you find such statements were made and were inconsistent with the witness' testimony during the trial, you may also use the statements as a basis for disregarding all or any part of that witness' testimony during the trial, but you are not required to do so. You should not disregard any person's testimony during the trial if other credible evidence supports it or if you believe it for any other reason.

**Authority**

Iowa Civil Jury Instruction 100.15

**PLAINTIFF'S PROPOSED FINAL JURY INSTRUCTION NO. 6**

**Damages**

You must award Plaintiff such sum as you find will fairly and justly compensate her for the damages she sustained as a result of: (1) Defendants' violation of Iowa's Workplace Drug Testing Law, Iowa Code section 730.5 and (2) Defendants violation of the public policy of the State of Iowa for firing Plaintiff for refusing to submit to an illegal drug test. The damages you award must be fair compensation—no more, no less.

Back Pay: In determining Plaintiff's Back Pay, you must award any past earnings she has lost as a result Defendants' wrongful conduct. Back pay is the amount of wages and fringe benefits Plaintiff would have earned from the date of harm to the present time, if she had not been subjected to illegal actions.

Keep in mind that absolute precision in proving what an employee would have earned if not for the Defendants' wrongful conduct is not required. Any uncertainties in computing lost wages should be resolved against the Defendants.

Emotional Distress: You must determine the amount of damages for any emotional distress sustained by Plaintiff Deborah Ferguson. Award her the amount that will fairly and justly compensate her for emotional distress damages you find she sustained as a result of the illegal actions. Damages for emotional distress include damages for emotional pain, suffering, mental anguish, humiliation, fear, apprehension, anxiety, inconvenience, loss to reputation, and loss of enjoyment of life. An employee does not need to introduce evidence of the monetary value of such damages. The amount you assess for these damages cannot be measured by any exact or mathematical standards. You must use your sound judgment based upon an impartial consideration of the evidence. When considering the amount of monetary damages to which a worker may be entitled for emotional distress, you should consider the nature, character, and seriousness of the

emotional pain she felt. You must also consider the extent or duration, as any award you make must cover the damages endured by the plaintiff since the wrongdoing to the present time.

You should also award damages for future emotional distress to an employee who has proven retaliation, if her emotional distress and its consequences can reasonably be expected to continue in the future.

The amounts, if any, you find for each of the above items of damages will be used to answer the verdict form.

**Authority**

Iowa Civil Jury Instructions 200.6 and 200.7

8th Circuit Model Jury Instruction 5.70 (2013)

*Lynch v. City of Des Moines*, 454 N.W.2d 827 (Iowa 1990)

*Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Comm'n*, 453 N.W.2d 512 (Iowa 1990)

*Franklin v. Gwinnett County Public Sch.*, 503 U.S. 60, 75-76 (1992)

*Mennen v. Easter Stores*, 951 F. Supp. 838, 859-61 (N.D. Iowa 1997)

*Neufeld v. Searle Labs.*, 884 F.2d 335, 341 (8th Cir. 1989)

**PLAINTIFF'S PROPOSED INSTRUCTION NO. 7**

**Mortality Table**

A Standard Mortality Table indicates the normal life expectancy of people who are the same age as Deborah Ferguson is 33.4 more years. The statistics from a Standard Mortality Table are not conclusive. You may use this information, together with all the other evidence, about Ms. Ferguson's health, habits, occupation, and lifestyle, when deciding issues of future damages.

**Authority**

Iowa Civil Jury Instruction 200.37

**PLAINTIFF'S PROPOSED FINAL JURY INSTRUCTION NO. 8**

**Punitive Damages**

Punitive damages may be awarded if the plaintiff has proven by a preponderance of clear, convincing, and satisfactory evidence that Defendants' conduct constituted a willful and wanton disregard for the rights or safety of another and caused actual damage to the plaintiff.

Punitive damages are not intended to compensate for injury but are allowed to punish and discourage Defendants and others from like conduct in the future.

There is no exact rule to determine the amount of punitive damages, if any, you should award. In fixing the amount of punitive damages, you may consider all the evidence including:

1. The nature of Defendants' conduct.
2. The amount of punitive damages which will punish and discourage like conduct by the defendants in view of their financial conditions.
3. The plaintiff's actual damages.

**Authority**

Iowa Code section 668A.1

*Larson v. Great West Cas. Co.*, 482 N.W.2d 170 (Iowa App. 1992)

*Suss v. Schammel*, 375 N.W.2d 252 (Iowa 1985)

*Nelson v. Restaurants of Iowa, Inc.*, 338 N.W.2d 881 (Iowa 1983)

**PLAINTIFF'S PROPOSED FINAL JURY INSTRUCTION NO. 9**

**Employer Liability for Punitive Damages**

An employer is liable for the punitive damages by the acts of an employee if one of the following occurred:

1. The employer authorized the act and the way it was done;
2. The employee was unfit and the employer was reckless in employing or retaining the employee;
3. The employee was employed in a managerial capacity and was acting in the scope of employment; or
4. The employer ratified or approved the act.

**Authority**

*Bethards v. Shivers, Incorporated*, 355 N.W.2d 39 (Iowa 1984)

*Briner v. Hyslop*, 337 N.W.2d 858 (Iowa 1983)

Restatement (Second) of Torts, section 909 (1979)



**PLAINTIFF'S PROPOSED FINAL JURY INSTRUCTION NO. 10**

**Willful and Wanton Conduct**

Conduct is willful and wanton when a person intentionally does an act of an unreasonable character in disregard of a known or obvious risk that is so great as to make it highly probable that harm will follow.

**Authority**

*Fell v. Kewanee Farm Equipment Co.*, 457 N.W.2d 911 (Iowa 1990)

*Kosmacek v. Farm Service Coop of Persia*, 485 N.W.2d 99 (Iowa App. 1992)

**PLAINTIFF'S PROPOSED FINAL JURY INSTRUCTION NO. 11**

**Juror's Notes**

During the trial, you have been allowed to take notes. You may take these with you to the jury room to use in your deliberations. Remember, these are notes and not evidence. Generally, they reflect the recollection or impressions of the evidence as viewed by the person taking them, and may be inaccurate or incomplete.

Upon reaching a verdict, leave the notes in the jury room, and they will be destroyed.

**Authority**

Iowa Civil Jury Instruction 100.21

**PLAINTIFF'S PROPOSED FINAL JURY INSTRUCTION NO. 12**

**Election of Foreperson; Duty to Deliberate; Communications with Court; Cautionary;**

**Unanimous Verdict; Verdict Form**

There are rules you must follow when you go to the jury room to deliberate and return with your verdict.

*First*, you will select a foreperson. That person will preside over your discussions and speak for you here in court.

*Second*, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach agreement if you can do this without going against what you believe to be the truth, because all jurors have to agree on the verdict.

Each of you must make your own decision, but only after you have considered all the evidence, discussed the evidence fully with your fellow jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinions if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right, or just to reach a verdict. Remember you are not for or against any party. You are judges – judges of the facts. Your only job is to study the evidence and decide what is true.

*Third*, if you need to communicate with me during your deliberations, send me a note signed by one or more of you. Give the note to the marshal, bailiff, or court security officer and I will answer you as soon as I can, either in writing or here in court. While you are deliberating, do not tell anyone – including me – how many jurors are voting for any side.

*Fourth*, your verdict must be based only on the evidence and on the law that I have given to you in my instructions. Nothing I have said or done was meant to suggest what I think your verdict should be. The verdict is entirely up to you.

*Finally*, the verdict form is your written decision in this case. You will take this form to the jury room, and when you have agreed on the verdict, your foreperson will fill in the form, sign and date it, and tell the marshal or bailiff that you are ready to return to the courtroom.

**Authority**

8th Circuit Model Civil Jury Instruction 3.6

IN THE IOWA DISTRICT COURT FOR DELAWARE COUNTY

DEBORAH FERGUSON,  Plaintiff,  vs.  EXIDE TECHNOLOGIES, INC., FRED GILBERT, and BRENDA SAUNDERS,  Defendants.	Case No. LACV008271   <b>PLAINTIFF'S PROPOSED VERDICT FORM</b>
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**Question No. 1:** What amounts do you order Defendants to pay for Plaintiff Deborah Ferguson's damages for each of the following items?

1. Back Pay \$ \_\_\_\_\_
2. Emotional Distress in the past \$ \_\_\_\_\_
2. Emotional Distress in the future \$ \_\_\_\_\_

**Question No. 2:** Do you find by a preponderance of clear, convincing, and satisfactory evidence the conduct of Defendants constituted willful and wanton disregard for the rights of another?

\_\_\_\_\_ Yes      \_\_\_\_\_ No

If your answer to question number 2 is "Yes," then go to question number 3. If your answer to question number 2 is "No," then each member of the jury should sign the verdict form and you should not answer question 3.

**Question No. 3:** Do you find that an award of punitive damages is appropriate?

\_\_\_\_\_ Yes                      \_\_\_\_\_ No

If your answer to question numbers 2 and 3 is “Yes,” answer question 4. If your answer to question 3 is “No,” then each member of the jury should sign the verdict form and you should not answer question 4.

**Question No. 4:** What amount do you think Defendants should pay in punitive damages?

1. Exide Technologies, Inc:                      \$ \_\_\_\_\_

2. Fred Gilbert:                                      \$ \_\_\_\_\_

\_\_\_\_\_  
Foreperson

\_\_\_\_\_  
Date